

R E M A R K S

Claims 1, 3, 5, 6 and 8-10 are pending in this application and stand ready for further action on the merits. Claims 1 and 6 have been amended to recite the subject matter of cancelled claims 2 and 7, respectively.

No new matter has been added by way of the above amendment.

Issues under 35 U.S.C. 103

Claims 1, 3-6 and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yamagishi et al. US 5,967,908 (hereinafter the '908 patent) in view of Yamagishi et al. US 5,779,563 (hereinafter the '563 patent).

Applicants respectfully submit that the presently claimed invention is not made obvious by the combination of the '908 patent and the '563 patent. However, in order to advance prosecution, claims 1 and 6 have been amended to recite the subject matter of claims not currently under rejection, i.e., claims 2 and 7, respectively. Accordingly, this rejection has been rendered moot.

Double Patenting

Claims 1-3 and 5-10 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-5 of co-pending Application No.

10/373,100 (the '100 application) in view of the '563 patent. Applicants respectfully traverse the rejection.

Applicants maintain the position that the present invention is not obvious over the claims of the '100 Application, in view of the unexpectedly superior properties of the polyurethane elastomer component in the cover material which is not recited in the '100 Application. However, in order to advance prosecution, Applicants have attached hereto a Terminal Disclaimer (TD) over the '100 Application.

In legal principle, the filing of a TD simply serves the statutory function of removing the rejection of obviousness-type double patenting, and does not raise a presumption on the merits of the rejection. It is improper to view the simple expedient of "obviation" as an admission or acquiescence on the merits. *Ortho Pharmaceutical Corp. v. Smith*, 22 USPQ2d 1119, 1124 (Fed. Cir. 1992) citing *Quad Envtl. Technologies Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 874, 20 USPQ2d 1392, 1394-95 (Fed. Cir. 1991).

Accordingly, this rejection is rendered moot.

DRAWINGS

Applicants note that the present application was filed with four (4) sheets of formal drawings. However, the Examiner has not acknowledged whether the drawings are acceptable.

Applicants respectfully request that the Examiner indicates in the next communication whether the drawings are acceptable.

Conclusion

In view of the above amendments and comments, Applicants respectfully submit that the claims in condition for allowance. However, should the Examiner find to the contrary, Applicants respectfully submit that the Examiner should enter this Amendment into the official record to place the claims in better form for appeal.

Pursuant to 37 C.F.R. §§ 1.17 and 1.136(a), Applicant(s) respectfully petition(s) for a one (1) month extension of time for filing a reply in connection with the present application, and the required fee of \$110.00 is attached hereto.

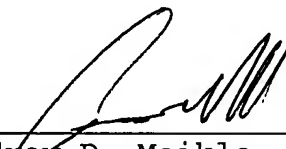
Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact **Garth M. Dahlen, Ph.D., Esq.** (Reg. No. 43,575) at the telephone number of the undersigned below.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies, to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37 C.F.R. §§ 1.16 or 1.17; particularly, extension of time fees.


Respectfully submitted,

BIRCH, STEWART, KOLASCH & BIRCH, LLP

By



Andrew D. Meikle, #32,868


ADM/GMD:kdm
367-0153P

P.O. Box 747
Falls Church, VA 22040-0747
(703) 205-8000

Attachments: Terminal Disclaimer and Transmittal thereof

(Rev. 02/12/2004)